UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, Plaintiff, v. OFFICE OF THE COMPTROLLER OF THE CURRENCY, and JOSEPH M. OTTING, in his official capacity as Comptroller of the Currency, Defendants.	Civil Action No. 1:18-CV-02449 (DLF)

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM

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INTRODUCTION

The Conference of State Bank Supervisors ("CSBS") fails to demonstrate that the Court has jurisdiction over this matter because the Office of the Comptroller of the Currency ("OCC") has not approved any application for a Special Purpose National Bank ("SPNB") Charter, which this Court held is the precondition requisite for CSBS suffering an injury and thus having standing to sue. *See CSBS v. OCC*, 313 F. Supp. 3d 285 (D.D.C. 2018) ("*CSBS I*"). Accordingly, for the reasons explained in the OCC's opening brief, ECF No. 12 ("OCC Mem."), and below, this lawsuit should be dismissed due to lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). Even if the Court had jurisdiction, CSBS's complaint is still subject to dismissal because the OCC's longstanding special purpose bank chartering regulation, 12 C.F.R. § 5.20(e)(1), is a reasonable construction of the National Bank Act that is entitled to *Chevron* deference. As the OCC has demonstrated, and as CSBS cannot rebut, the conclusion that a national bank need only be engaged in one of the three identified core banking functions in order to be engaged in the "business of banking" fits within the context and structure of the National Bank Act and controlling Supreme Court and D.C. Circuit caselaw. The other myriad arguments CSBS raises in its opposition brief, ECF No. 15 ("Opp."), are equally meritless. Thus, even if the Court had jurisdiction, CSBS's claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

ARGUMENT

I. CSBS'S OPPOSITION FAILS TO DEMONSTRATE IT HAS STANDING TO SUE

A. Issue Preclusion Bars CSBS from Re-Litigating Whether It Has Article III Standing to Sue or Whether Its Claims Are Ripe for Judicial Review

As the OCC explained, and as CSBS concedes, CSBS is precluded by this Court's decision in *CSBS I* from re-litigating the issue of whether, absent a grant of an SPNB Charter, CSBS has Article III standing to sue or whether its claims are prudentially ripe *unless* CSBS can satisfy the "curable defect" exception to the *res judicata* effect of jurisdictional dismissals. *See* OCC Mem. 9; Opp. 11; *see also Nat'l Ass'n of Home Builders v. E.P.A.*, 786 F.3d 34, 41 (D.C. Cir. 2015). CSBS has failed to satisfy this exception. The curable defect exception is "sharply limited." *Nat'l Ass'n of Home Builders*, 786 F.3d at 41. It applies only "where a 'precondition requisite' to the court's proceeding with the original suit was not alleged or proven, and is supplied in the second suit[.]" *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (citations omitted). Thus, to meet this exception, CSBS must demonstrate "a material change following dismissal cur[ing] the original jurisdictional deficiency." *Nat'l Ass'n of Home Builders*, 786 F.3d at 41.

This Court already identified the precondition requisite to going forward with determining the merits of this matter: the issuance of an SPNB Charter to a particular Fintech. *See CSBS I*, 313 F. Supp. 3d at 298 ("*if* the OCC were to charter a Fintech, then that national charter would preempt conflicting state laws . . . [a]t that point, the impacted state surely may allege an injury in fact"). CSBS has not (and cannot) allege facts demonstrating the occurrence of this necessary material change, because no such charter has yet been issued. Indeed, at this point, "no application for an SPNB Charter has been filed with the OCC." *See* OCC Mem. 7-8 and Lybarger Decl., Ex. B ¶¶ 6-7; *see also* Defs.' Opp. to Pl.'s Alternative Mot. for Leave to

Conduct Jurisdictional Disc. 2, Feb. 19, 2019 (ECF No. 18) ("Defs.' Disc. Opp.") (explaining also that when an application is filed there will be public notice).

CSBS attempts to sidestep the *res judicata* effect of *CSBS I* by contending that the OCC's announcement that it would begin accepting SPNB Charter applications, coupled with OCC counsel's tentative statements at oral argument in *Vullo v. OCC*, No. 17 CIV. 3574 (NRB), 2017 WL 6512245, (S.D.N.Y. Dec. 12, 2017), satisfies the curable defect exception. *See* Opp. 12. This argument is without merit. The Court's opinion in *CSBS I* makes clear that the OCC's decision to accept applications does not, on its own, create an injury in fact, as it is only the first of the four chartering-process milestones the Court identified. *CSBS I*, 313 F. Supp. 3d at 296. In finding that CSBS's alleged injuries were too speculative to confer standing in *CSBS I*, the Court noted that "the second step—a Fintech's electing to apply—had not occurred, let alone the third or fourth." *Id.* at 297. The Court's observation applies equally today; no SPNB Charter application has been filed. Thus, while the OCC has announced it will accept SPNB Charter applications, this change is immaterial to the Court's conclusion regarding standing, because the remaining three chartering-process milestones must still be completed. Thus, the OCC's decision to accept SPNB Charter applications does not satisfy the curable defect exception.

CSBS also asserts that OCC counsel's statements at oral argument before the *Vullo* court constitute an admission that the jurisdictional defect has been cured. But as the D.C. Circuit has long held, "[j]urisdiction cannot be conferred upon the court either by admissions, stipulation, or otherwise." *U.S. ex rel. Abilene & S. Ry. Co. v. I.C.C.*, 8 F.2d 901, 902 (D.C. Cir. 1925). For this reason alone, CSBS's contention is unavailing. Moreover, the statement at issue, that the OCC "would likely be in a very different posture" if it "decided to issue 5.20(e)(1) charters to fintech companies and are accepting applications for them," is not a concession of standing or

jurisdiction. *Transcript of Proceedings* ("*Vullo* Transcript") at 11-12, attached to Opp. as Ex. 1. Counsel for the OCC made clear that he did not "want to foreclose any arguments that the government might have." *Id.* at 22. Ironically, at that same hearing counsel for New York State Department of Financial Services ("DFS"), a member of CSBS, acknowledged that none of the alleged harm would ensue if the OCC did not issue a charter:

> THE COURT: Mr. Levine, if the OCC never issues a 5.20(e)(1) charter to a fintech company, is it correct that none of the injuries which DFS alleges will ever occur?
>
> MR. LEVINE: I believe that's correct, your Honor.

Vullo Transcript at 3:11-13.

While CSBS apparently ignored that exchange, the *Vullo* court did not. *See Vullo v. OCC*, No. 17 CIV. 3574 (NRB), 2017 WL 6512245, at *7 (S.D.N.Y. Dec. 12, 2017) ("DFS conceded at oral argument [that] none of its alleged injuries will actually occur if the OCC never issues an SPNB charter to a fintech company."). Thus, consistent with *CSBS I*, the *Vullo* court noted that DFS, a CSBS member, admitted that it will suffer no injury, and thus enjoy no standing, until an SPNB Charter is issued.

B. CSBS Fails to Demonstrate Actual or Imminent Harm

As this Court previously noted, any harm caused by regulatory interference is "contingent on whether the OCC charters a Fintech." *CSBS I*, 313 F. Supp. 3d at 296. Indeed, as this Court further observed, "[t]he OCC's national bank chartering program does not conflict with state law *until* a charter has been issued." *Id.* at 298 (emphasis added). No SPNB Charter has been issued and, therefore, none of the alleged "regulatory interference" could have possibly occurred.

CSBS attempts to cure this fundamental defect in its case by putting forth a novel concept best described as "retroactive preemption," or the idea that an entity that *may* apply for a national

bank charter should be deemed to have gained the benefit of national bank preemption with respect to its activities for purposes of standing and ripeness. CSBS's argument is a fundamentally erroneous conflation of two core concepts—(1) the exclusive nature of the OCC's visitorial authority to regulate national banks, 12 U.S.C. § 484, 12 C.F.R. § 7.4000(a), and (2) the preemption of state laws under the Supremacy Clause of the Constitution. CSBS argues that the OCC has taken the position in an *amicus curiae* brief filed in *The Bank of Tokyo-Mitsubishi UFJ, Ltd. v. Vullo*, No. 1:17-cv-08691 (S.D.N.Y.) ("*Bank of Tokyo*"), that "the preemptive effect of the national bank charter is applied *retroactively* to that entity's conduct from the moment of its creation and thus *prior* to receiving its charter" and, as a consequence, "CSBS's members have already lost regulatory authority over applicants that have formed the corporate entity that will apply for a charter." Opp. 8, 10 (emphasis in original). This is incorrect.

CSBS's argument misapprehends the nature of the dispute at issue in *Bank of Tokyo*. The preemption of particular state laws governing the operations of a bank within New York is not at issue in that case, nor was it the topic of the *amicus curiae* brief submitted by the OCC. The core issues in *Bank of Tokyo* are (1) a request by a pre-existing branch of a foreign bank for a determination that its conversion from a state supervision to OCC supervision was lawful, and (2) a counterclaim brought by DFS, the banking supervisor for the state of New York, seeking to impose a civil money penalty for alleged violations of law that occurred prior to the conversion. The OCC's *amicus curiae* brief does not address the issue of whether federal law displaces state law with regard to the substance of the alleged violations, but whether, consistent with 12 U.S.C. § 484, the New York banking supervisor may exercise visitorial authority over the branch post-conversion at all, even for pre-conversion violations. The OCC's *amicus curiae* brief takes the position that, consistent with federal law, only the OCC or an authorized representative of the

OCC may exercise visitorial powers with respect to national banks or federally regulated branches of foreign banks. *See Amicus Br.* 4-5, 23-25, attached to Opp. as Ex. 6. These powers include the ability to bring an administrative action for alleged violations of law that may have occurred prior to conversion.

More to the point, Plaintiff's specious arguments about "retroactive preemption" fail to address the fundamental difference between *Bank of Tokyo* and this case. In *Bank of Tokyo*, the OCC took action by granting the branch's application for a conversion to a federal charter while, in the current litigation, no federal charter has been granted. Absent the actual granting of a charter, CSBS cannot demonstrate an actual or imminent[1] injury in fact. *Cf. CSBS I*, 313 F. Supp. 3d at 298 (no regulatory injury demonstrated where "CSBS does not assert that any state law has been preempted by the OCC's preliminary activities respecting Fintech charters" and where "CSBS also does not allege that any Fintech can freely ignore state law because of the OCC's statements"); *see also West Virginia ex rel. Morrisey v. U.S. Dep't of Health & Human*

[1] CSBS attempts to manufacture a conclusion that the grant of an SPNB Charter is impending by citing "empirical data" which purports to demonstrate that a SPNB Charter will soon be issued. *See* Opp. 8-9 and Exs. 7 & 7A, Decl. of M. Townsley and CAST data. This "empirical data" is inaccurate, misleading, and unverifiable. *See* Defs.' Disc. Opp. 5 n.2 and Ex. 1, Decl. of S. Lybarger ¶¶ 10-17. Therefore, it provides no basis for concluding that a charter grant is imminent. The OCC remains several steps removed from issuing any SPNB Charter. *Id.*; *see also CSBS I*, 313 F. Supp. 3d at 296; OCC Mem., Ex. B, Lybarger Decl. ¶¶ 6-20. CSBS also mischaracterizes an OCC regulation (12 C.F.R. § 5.4(f)), wrongly contending it provides that submission of draft materials expedites the application review process. Opp. 7. This regulation is inapposite. It pertains to corporate activities and transactions of national banks, not to the chartering process. *See* 12 C.F.R. § 5.1. Moreover, "[t]he OCC employs the draft application process to better understand the potential challenges inherent in unusual or complex filings and the major obstacles from a policy or risk perspective. Filing a draft application does not guarantee that the OCC will approve a formal application." *Comptroller's Licensing Manual Supplement, Considering Charter Applications from Financial Technology Companies*, p. 4 n.11, attached to OCC Mem. as Ex. D.

Servs., 827 F.3d 81, 84 (D.C. Cir. 2016) (even if federal government action "created a theoretical breach of State sovereignty," states must still establish "a concrete injury-in-fact").

Nor has CSBS given the court any reason to revisit the decision in *Vullo*—already addressed by the Court in *CSBS I*—as a basis to conclude that anything has changed. Further, the additional cases CSBS cites—*Scahill v. District of Columbia*, 909 F.3d 1177 (D.C. Cir. 2018) and *New York v. Dep't of Commerce*, No. 18-CV-2921, 2019 WL 190825 (S.D.N.Y. Jan. 15, 2019)—highlight clearly why it has failed to allege an imminent injury. In both cases, the plaintiffs could identify the location of the alleged injury and, in *New York v. Department of Commerce*, which specific states were injured. In contrast, CSBS has failed to identify which of its member states have been injured, and, in truth, it must concede that it will be unable to do so until an SPNB Charter is issued. *See CSBS I*, 313 F. Supp. 3d at 299 (no standing where CSBS failed to identify harmed member).

Finally, CSBS again alleges that it deserves special solicitude in the standing analysis. Opp. 16-17 (citing *Massachusetts v. E.P.A.*, 549 U.S. 497, 518-20 (2007). But as this Court already observed, special solicitude "does not eliminate the state petitioner's obligation to establish a concrete injury." *CSBS I*, 313 F. Supp. 3d at 298. Because CSBS cannot demonstrate its members have suffered an injury, it is not deserving of any special solicitude. *Id.* (noting that "Massachusetts had already suffered an injury, but CSBS's members have not").

C. CSBS Fails to Demonstrate that this Matter Is Ripe for Judicial Review

CSBS remains unable to demonstrate that this matter is constitutionally or prudentially ripe for judicial review. "Constitutional ripeness is 'subsumed' by standing's injury-in-fact requirement." *CSBS I*, 313 F. Supp. 3d at 299 (citing *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 386 (D.C. Cir. 2012)). Because CSBS has failed to establish an injury in fact, this matter is

constitutionally unripe. *Id.* In terms of prudential ripeness, CSBS's contention that a matter is presumptively ripe because it raises a "purely legal" issue, Opp. 18, is incorrect. Even "purely legal issues may be unfit for review." *CSBS I*, 313 F. Supp. 3d at 301 (citation omitted). As this Court previously held, "[t]his dispute presents legal issues that are unfit for review" because "the dispute involves the interpretation of statutes entrusted to the OCC, and both parties brief the issue of *Chevron* deference." *Id.* This matter will only become fit for judicial decision when "the OCC elects to adopt and apply a regulatory scheme to a particular Fintech charter." *Id.* This has not yet occurred. CSBS also fails to demonstrate that the setting is sufficiently concrete to render the matter prudentially ripe. This Court previously held that the "dispute would benefit from a more concrete setting and additional percolation. In particular, this dispute will be sharpened if the OCC charters a particular Fintech—or decides to do so imminently." *Id.* at 300. Finally, for the reasons the OCC previously explained, CSBS fails to demonstrate a hardship in deferring judicial review. OCC Mem. 12. Accordingly, this matter remains prudentially unripe.

II. CSBS CANNOT IDENTIFY A FINAL AGENCY ACTION BY THE OCC TO MAKE THE OBJECT OF A TIMELY CHALLENGE

As before, CSBS's second suit comes much too late to be heard as a facial challenge to 12 C.F.R. § 5.20(e)(1). The applicable statute of limitations expired in 2010, six years after the final rule became effective, making the suit time-barred. OCC Mem. 15-16. CSBS's suit also comes too early because there has been no final agency action pursuant to the OCC's regulation that would provide the necessary factual basis to state a claim under the Administrative Procedure Act ("APA") in this case. *Id.* at 13-15. The OCC's July 31 Announcement is not a final agency action that is subject to judicial review because until the OCC grants an SPNB Charter to a particular fintech company no actual "consummation of the agency's decision-making" will have occurred from which "rights or obligations will have been determined" or

from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also Ipsen Biopharm., Inc. v. Hargan*, 334 F. Supp. 3d 274, 279 (D.D.C. 2018) (citing *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806-07 (D.C. Cir. 2006)).

CSBS attempts to evade application of the six-year statute of limitation by arguing that the OCC's actions in conjunction with its July 2018 Announcement have served to reopen the issue. Under controlling D.C. Circuit law, the relevant statute of limitations, 28 U.S.C. § 2401(a), "'is a jurisdictional condition'" that "'must be strictly construed.'" *Jackson v. Spencer*, 313 F. Supp. 3d 302, 309 (D.D.C. 2018) (quoting *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987)). None of CSBS's claimed exceptions, Opp. 22-25, allow CSBS to avoid the jurisdictional bar.

First, the OCC has not applied Section 5.20(e)(1) to charter an SPNB. Second, neither the July 31 Announcement, nor the OCC's actions leading up to that announcement, reopens the issue of whether the OCC has the authority under the National Bank Act to issue an SPNB Charter. There are no statements suggesting that the OCC revisited Section 5.20(e)(1) as part of its initiative leading to the July 2018 Announcement and the regulation was neither amended nor reissued. *See P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1023-24 (D.C. Cir. 2008) ("[reopening] doctrine only applies . . . where 'the entire context' . . . demonstrates that the agency 'ha[s] undertaken a serious, substantive reconsideration of the [existing] rule'") (citation omitted); *see also Am. Iron & Steel Inst. v. E.P.A.*, 886 F.2d 390, 398 (D.C. Cir. 1989) (petitioners cannot "comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue").

CSBS's appeal to the constructive reopening doctrine is also unavailing. The OCC has stated unequivocally since 2003 that it has authority to charter special purpose national banks

that engage in only one of the identified core banking functions. The July 31 Announcement was not "an accompanying regulation" that caused a "sea change" in the OCC's view of its chartering authority; rather, the announcement was consistent with Section 5.20(e)(1)'s express and unambiguous text. *See Nat. Res. Def. Council v. E.P.A.*, 571 F.3d 1245, 1266 (D.C. Cir. 2009) (doctrine inapplicable when "basic regulatory scheme remains unchanged").

Finally, CSBS misreads *Public Citizen v. Nuclear Regulatory Commission*, 901 F.2d 147 (D.C. Cir. 1990). Opp. 25. *Public Citizen* did not hold that an otherwise time-barred APA challenge may go forward because an alternative procedure to petition for amendment or repeal exists. The deadlines at issue were under review provisions in the Hobbs Act and Nuclear Waste Policy Act, not 28 U.S.C. § 2401(a). *Id.* at 150-51. The court did not waive a deadline due to the possibility of a petition. Rather, the suit was timely because NRC had reopened its decision. *Id.* ("Commission did not merely implicitly reexamine its former choice; it did so explicitly.").

III. CSBS FAILS TO ESTABLISH THAT THE OCC'S INTERPRETATION OF THE NATIONAL BANK ACT CHARTERING PROVISIONS IS CONTRARY TO CONGRESS'S CLEARLY EXPRESSED INTENT OR IS UNREASONABLE

A. Under *Chevron* Step One, "Business of Banking" Lacks Express Meaning, Allowing the OCC to Reasonably Interpret the Term and Its Chartering Authority

1. *Statutory Text and Caselaw Establish that the Term "Business of Banking" Is Ambiguous and Subject to the OCC's Interpretive Authority under Chevron*

Even CSBS acknowledges that the term "business of banking," as it appears in the National Bank Act, 12 U.S.C. §§ 21, 24(Seventh), 26, and 27, is undefined. Moreover, context surrounding usages of the term in the National Bank Act provides no textual clues giving it specific meaning. *Id.*; *see also* OCC Mem. 20-22. With respect to the provisions related to chartering, 12 U.S.C. §§ 21, 26, and 27, there is no text setting forth mandatory activities that

must be performed in order for a bank to be engaged in the "business of banking." *Id.* Therefore, the phrase is inherently ambiguous.

CSBS's arguments try to minimize Supreme Court precedent holding that there is no expressed congressional intent as to the meaning of "business of banking." *See NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) ("*NationsBank*"). In *NationsBank*, the Court concluded that the term "business of banking" is ambiguous and that the Comptroller's reasonable interpretation of the term would receive "controlling weight." *Id.* at 257 (applying the framework articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). CSBS argues that *NationsBank* is inapposite because it addresses the permissible "*outer* limits" of the "business of banking" and not the minimum activities that are necessary to be engaged in banking. Opp. 43. This distinction is of no import here. The specific legal question before the Court in *NationsBank*—whether the sale of annuities is an activity part of or incidental to the business of banking under 12 U.S.C. § 24(Seventh)—does not undermine the Supreme Court's conclusions, controlling here, that (1) the term "business of banking" is ambiguous, and (2) *Chevron* deference is accorded to the Comptroller in interpreting the meaning of the term. OCC Mem. 22-24.

Nor does CSBS meaningfully distinguish the D.C. Circuit opinion establishing that the Comptroller is entitled to *Chevron* deference when interpreting the minimum activities required for national banks (CSBS's so-called "*inner* limits," Opp. 43). *See Indep. Cmty. Bankers Ass'n of S.D. v. Bd. of Governors of the Fed. Reserve Sys.*, 820 F.2d 428 (D.C. Cir. 1987) ("*ICBA v. FRB"*). OCC Mem. 25-27. While it is true that the credit card bank at issue in that case engaged in very limited deposit taking, that fact has no bearing on the court's analysis given that the opinion places no weight on that fact. *See* OCC Mem. 35 n.10. The opinion makes no statement

regarding the importance of the deposit-taking function. *ICBA v. FRB*, 820 F.2d at 440. CSBS cannot reconcile its argument that deposit taking should be treated as a *mandatory* activity for national banks with the D.C. Circuit's conclusion that "[t]here is nothing in the language of the National Bank Act that indicates congressional intent that the authorized activities for nationally chartered banks be mandatory." *Id*.

2. CSBS Ignores Section 27's History and Structure, and Therefore Misinterprets the Effect of Later-Enacted Statutes Related to Specific Types of National Banks

Borrowing from a pair of isolated district court opinions, *see infra* pp. 13-14, CSBS wrongly claims that Congress must specifically authorize the OCC to charter limited or special purpose institutions that are not endowed with the full set of bank powers that are available under the National Bank Act. Opp. 36-38. CSBS points to the provisions in the National Bank Act that relate to trust banks and banker's banks as proof of its point. CSBS's argument misunderstands Section 27(a)'s fundamental role in all national bank chartering activity and asks the Court to misapply the *expressio unius* canon of statutory interpretation. OCC Mem. 31-33. The OCC's general authority to charter "association[s] . . . lawfully entitled to commence the business of banking," 12 U.S.C. § 27(a), is properly understood to be the statutory basis for the OCC's authority to charter full-service institutions, as well as special purpose banks including credit card banks, trust banks, bankers' banks, and SPNBs. *See* 12 U.S.C. § 27(a); *see also* 12 U.S.C. §§ 21, 26.

CSBS relies heavily upon the fact that Section 27(a) was amended in 1978[2] to add a reference to trust banks to support its assertion that a specific authorization is needed for SPNB

[2] "A National Bank Association, to which the Comptroller of the Currency has heretofore issued or hereafter issues such certificate, is not illegally constituted solely because its operations are or have been required by the Comptroller of the Currency to be limited to those of a trust company and activities related thereto." Financial Institutions Regulatory and Interest Rate Control Act of

Charters. This argument, however, ignores how the actual language of the 1978 amendment simply *confirmed* the lawfulness of prior Agency practice and quelled any doubts regarding the lawfulness of chartering trust banks going forward. OCC Mem. 32 n.12.

As for bankers' banks, the other type of special purpose bank highlighted by CSBS, the statutory text specific to national banks offering correspondent banking services, added in 1982, cannot be understood as creating a new and separate *chartering* authority where none had previously existed. *See* 12 U.S.C. § 27(b)(1). Bankers' banks engage in the "business of banking" by taking deposits from other banks, lending to other banks, and/or processing payments for other banks, all activities included in a full-service charter available pursuant to Section 27(a). No additional authority was required to allow the chartering of a depository institution that would limit its business plan to performance of these services for other depository institutions, their holding companies, and their officers, directors, and employees. Instead, Section 27(b)(1), as part of a set of amendments, identifies a category of national bank that is subject to different statutory restrictions on stock ownership and is eligible for exemptions from certain statutory restrictions applicable to most other national banks. *See* Garn–St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 404, 96 Stat. 1469, 1511 (1982).

3. CSBS's Arguments Rely Upon Flawed Reasoning in Defunct Cases

CSBS's theory of its case draws primarily from two unpublished district court opinions: (1) *National State Bank of Elizabeth, N.J. v. Smith*, No. 76-1479, 1977 U.S. Dist. LEXIS 18184 (D.N.J. Sept. 16, 1977) ("*National State Bank*"), a judgment reversed on appeal, and (2) *Independent Bankers Association of America v. Conover*, No. 84-1403-CIV-J-12, 1985 U.S. Dist. LEXIS 22529 (M.D. Fla. Feb. 15, 1985) ("*Conover*"), an interim order vacated before final

1978, Pub. L. No. 95-630, § 1504, 92 Stat. 3641, 3713 (1978) (Title XV Miscellaneous Provisions).

judgment. Opp. 36-41. As explained in the OCC's initial brief, neither case is good law and the reasoning of both decisions is flawed. OCC Mem. 34-35.

CSBS's reliance on *National State Bank* in its response to the OCC's motion only serves to highlight the flaws[3] in that decision. Opp. 36-38. As explained previously, Congress subsequently repudiated the notion that the OCC lacked the authority to charter a trust bank in its 1978 amendments to Section 27(a), a fact noted by the Third Circuit on appeal. *National State Bank of Elizabeth, N. J. v. Smith*, 591 F.2d 223, 231 (3d Cir. 1979) (reversing district court) (Congress "validate[d] retroactively as well as prospectively the action of the Comptroller in limiting to the business of a trust company the operation of a national banking association to which he has granted a certificate of authority to commence business").

As for *Conover*, CSBS promotes the district court's same errant views concerning trust banks and banker's banks, *see supra* pp. 12-13, in addition to the district court's misguided insistence that the definition of a "bank" under the Bank Holding Company Act ("BHCA") determines what type of entity can be chartered as a national bank pursuant to the National Bank Act. Opp. 38-40. There is no support for CSBS's position that the statutes must operate in lockstep regarding the characteristics of entities that may be chartered by the OCC as national banks and entities that are treated as "banks" for the purposes of the BHCA. *See infra* pp. 22-24.

[3] The district court opinion incorrectly found that a national bank must have *all* of the powers enumerated at 12 U.S.C. § 24(Seventh) and must engage in "operations of discount and deposit" to satisfy the requirement at 12 U.S.C. § 22 that "an organization certificate . . . state . . . [t]he place where operations of discount and deposit are carried out." 1977 U.S. Dist. LEXIS 18184 at *22-24. CSBS asks the Court to adopt the same view. Opp. 49. But this conclusion leads to absurd results. For example, operations of discount, identified by Section 22—as well as some powers enumerated at Section 24(Seventh), *e.g.* obtaining, issuing, and circulating notes – have not been undertaken by banks in the modern era. OCC Mem. 30-31. Based on this faulty understanding, the district court misinterpreted Section 22 and Section 24(Seventh) as setting forth minimum activities for a national bank.

Finally, the subsequent decisions in *NationsBank* and *ICBA v. FRB* invalidated the underpinnings of both *Conover* and *National State Bank* by holding that the OCC has interpretive authority over what banking activities are permissible for a national bank and what functions are mandatory. *See supra* pp. 11-12.

4. CSBS's Inclusion of Statutes Outside of the National Bank Act into Chevron Step One Analysis Is Improper and Effectively Concedes Lack of Plain Meaning

CSBS effectively concedes that Congress did not provide express guidance regarding the meaning of "business of banking" for purposes of national bank chartering when it insists that the Court look to statutory provisions *outside* the National Bank Act to determine the term's meaning. CSBS's cited cases, Opp. 27-30, do not suggest that the unambiguous intent of Congress has been captured outside the National Bank Act in other statutes that do not even use the term "business of banking" or discuss authority to issue a national bank charter. *See infra* p. 22 n.7. Accordingly, any impact that these federal banking statutes may have upon the Court's analysis is, at most, confined to the *Chevron* step two analysis. *See infra* pp. 18-27.

B. No Circumstances in this Case Reduce the Degree of Deference Due to the Comptroller Under *Chevron*

The application of the *Chevron* framework to the OCC's interpretation of the National Bank Act is well-established and not subject to serious dispute. OCC Mem. 19, 22. CSBS apparently concedes that application of *Chevron* is not altered when an agency is interpreting its own authority. *See* OCC Mem. 20. Nevertheless, CSBS now posits three other purported reasons why *Chevron* deference should be withheld. Opp. 25-27. All are without merit.

First, CSBS mischaracterizes the OCC announcement that it will accept applications for SPNB Charters as "*vastly* inceas[ing] the scope of its authority," making *Chevron* inapplicable. Opp. 27 (emphasis added). This argument fails under *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290, 298 (2013) (no *Chevron* exception for

interpretations of an agency's own statutory authority). OCC Mem. 20. Furthermore, CSBS's cited cases—*F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) and *MCI Telecom. Corp. v. AT&T Co.*, 512 U.S. 218 (1994)—are inapposite because the Court's analysis in those decisions stopped at *Chevron* step one after the Court found clearly expressed congressional intent.

Second, CSBS asks the Court to withhold deference because the OCC's interpretation "hinge[s]" upon the interpretation of statutes over which it lacks authority. Opp. 25-26. It is CSBS, not the OCC, which is relying on statutes outside the National Bank Act to offer an interpretation of the National Bank Act's chartering provisions. *See infra* pp. 21-27. The OCC's understanding of its chartering authority rests on its interpretation of the National Bank Act.[4] Even if it were necessary to look outside the National Bank Act to interpret the statute, the case cited by CSBS, *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018), does not suggest the OCC should be accorded less deference when the meaning of federal banking statutes is implicated. Rather, the Court referenced instances of agencies interpreting limits on statutes *far* removed from the agencies' expertise, *id.* at 1629, a concern not implicated by the OCC's analysis. *See infra* pp. 21-27.

Third, CSBS suggests that no deference is due because 12 C.F.R. § 5.20(e)(1), promulgated in 2003, purportedly reverses a "longstanding" OCC interpretation that deposit taking is a necessary function for a national bank. Opp. 44-45, 49. This contention is both

[4] On this point, CSBS misinterprets the meaning of the exclusion of Section 36 from general rule-making authority. Opp. 27, 44-45. According to the legislative history, 12 U.S.C. § 93a has a carve out for Section 36 to "make[] clear that the rule-making provision carries no authority to permit otherwise impermissible activities" according to restrictions placed on branching under the McFadden Act. *See* H.R. Conf. Rep. No. 96-842, 96th Cong., 2d Sess. (March 21, 1980). Section 93a does not diminish the OCC's interpretive authority over Section 36. At any rate, the interpretation at issue here is one of chartering authority, not branching provisions.

factually and legally inaccurate. The OCC's briefs filed over 30 years ago in *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987) ("*Clarke v. SIA"*), contain no pronouncement on what minimum activities are necessary for an entity to be engaged in the "business of banking" and to be chartered as a national bank.[5] Likewise, a 1985 decision by the OCC on a branch application also cited by CSBS, Opp. 47, 49-50, does not discuss this point either. 1985 OCC QJ LEXIS 812. Rather, the OCC analyzed activities of savings associations under Mississippi law. OCC Mem. 36-37. Moreover, even if Section 5.20(e)(1) did represent a change in agency view (it does not), agencies continue to receive *Chevron* deference for reinterpretations of ambiguous statutory terms. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."). The promulgation of 12 C.F.R. § 5.20(e)(1) in 2003—adopted more than 15 years after *Clarke v. SIA* and the analysis of the Mississippi branch application—moots CSBS's argument.

C. Under *Chevron* Step Two, the OCC's Interpretation of the Minimum Activities for Engaging in the "Business of Banking" Is Reasonable and Properly Upheld

Because the relevant portions of the National Bank Act are ambiguous and subject to the interpretive authority of the OCC pursuant to *Chevron*, the only remaining question is whether the OCC's interpretation is reasonable. Nothing proffered by CSBS calls into question the

[5] Historic caselaw does not support this view either. *See Selden v. Equitable Tr. Co.*, 94 U.S. 419, 423 (1876) (holding that a company that "invest[ed] its own capital in mortgage securities on real estate, and s[old] such mortgage securities" was not a "banker, as defined by the revenue laws"); *Warren v. Shook*, 91 U.S. 704, 710 (1875) (describing as "satisfactory" the definition of "banker" contained in 1864 Revenue Act which lists three core banking functions *disjunctively*). The Supreme Court did recognize that an institution can be a bank if it engages in deposit taking, discounting, *or* circulation, OCC Mem. 37 (citing *Oulton v. German Sav. & Loan Soc.*, 84 U.S. 109, 119 (1872)), acknowledging that banking functions such as lending and facilitation of payments can, as a practical matter, be carried out through the intermediation of money in ways other than deposit taking.

conclusion that, under *Chevron* step two, the OCC's interpretation of what constitutes the minimum activities necessary to be considered engaged in the "business of banking" is reasonable and should be upheld.

1. The OCC Reasonably Interpreted "Business of Banking" in 12 U.S.C. § 27 by Reference to Related Concepts in Location and Branching Provisions

Having concluded that the term "business of banking" as used in the National Bank Act is ambiguous, the OCC reasonably referenced related concepts found in the location and branching provisions of the National Bank Act to interpret the term. In the interpretive framework utilized by the OCC when it promulgated Section 5.20(e)(1), the OCC drew an analogy between what activities constitute the "general business of each national banking association," which under the "location" provisions at 12 U.S.C. § 81 must be transacted at a national bank's main office or a branch, and the minimum activities that constitute the "business of banking" under Section 27 (as well as Section 21 and Section 26). Although the terms are not identical, and the location provisions at Section 81 are distinct from the chartering provisions at Section 27, both seek to identify core banking functions, a subset of the broader array of possible activities that make up the business of banking.

Given the established interpretation that the "general business of each national banking association" includes, at a minimum, any one of the three core activities identified at Section 36(j), *see Clarke v. SIA*, 479 U.S. at 389, it reasonably follows that conducting any one of these core activities—receiving deposits, paying checks, or lending money—qualifies as carrying out the "business of banking" under Section 27. OCC Mem. 27-28. Moreover, Section 36(j) reflects a congressional judgment that the conduct of any one of these three activities carries the threat of competitive harm to state-chartered institutions, thus forming the basis for the branching restrictions. *Id.* Therefore, it was entirely reasonable for the OCC to conclude that

engaging in any one banking activity that rises to the level of statutorily-recognized potential competitive harm constitutes carrying out the "business of banking."

CSBS's argument that chartering and branching are not the same thing, Opp. 45-47, does not cast doubt on the OCC's reasonableness in choosing to interpret the chartering provisions of the National Bank Act by reference to other parts of the same statute. Nor does its cited cases support this view. *See, e.g., Pineland State Bank v. Proposed First Nat'l Bank of Bricktown*, 335 F. Supp. 1376, 1379 (D.N.J. 1971) (rejecting the argument that a new national bank was required to comply with restrictions under state law: "a state clearly has no authority to prohibit the creation of a national bank or, once established, to confine or restrict its operations").[6] Moreover, the notion that the OCC's interpretation conflicts with the McFadden Act, an enactment that CSBS argues is an attempt by Congress to limit the OCC's authority, is nonsensical. Opp. 47. The McFadden Act ushered in an era in which national bank branching was allowed for the first time, albeit under the restrictions stated at Section 36; the notion that an *expansion* of bank powers should be construed as a *limitation* on the OCC's chartering authority simply makes no sense.

[6] *Pineland State* also negates the view that chartering SPNBs circumvents the branching statutes and creates "*de facto* branches." Opp. 47. As CSBS emphasizes, *Pineland State* held that branching provisions have no operational application to chartering. *Id.* at 46. Moreover, the case CSBS cites for the proposition that Section 36 requires equality *in the definition* of national and state banks, *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 256 (1966), Opp. 47, says nothing of the sort. Nor would the establishment of SPNBs circumvent the conversion statute. Opp. 30 n.12, 52-53. The fact that a fintech company, holding no banking charter, is ineligible for a *conversion* to a federal charter, does not make *chartering* a *de novo* SPNB that conducts business similar to that of a fintech company a circumvention. Also contrary to CSBS's assertions, (1) natural persons will be organizers of SPNBs, *see* Licensing Manual Supplement, OCC Mem., Ex. D at 6, and (2) the cited definition of bank, 12 U.S.C. § 214, does not require receiving deposits.

2. CSBS's Attempt to Distinguish Clarke v. SIA Fails

CSBS attacks the OCC's invocation of *Clarke v. SIA* by (1) positing that it is the OCC's position "that the phrase 'general business' in Section 81 should be read to be coterminous with the term 'business of banking,'" and (2) arguing that *Clarke v. SIA* disproves this view. Opp. 48. These arguments misapprehend both the OCC's analysis and the holding in *Clarke v. SIA*.

Clarke v. SIA validates the OCC's analysis not because the statutory terms "should be read to be coterminous" but because the Court rejected the respondent's position that the "general business of each national banking association," as used in Section 81, makes up "all the business in which the bank engages." *Clarke v. SIA*, 479 U.S. at 404-09. Instead, the Supreme Court confirmed the OCC's analysis that the three core banking functions identified at Section 36 are an appropriate guide for understanding the scope of the more limited set of activities that make up a national bank's "general business" under Section 81. *Id.* In other words, the case rejects equating the "general business of each national banking association" with the "business of banking" as the term is used in 12 U.S.C. § 24(Seventh), the "*outer* limits" of the business of banking. The case does *not* reject recognizing a logical connection between the "general business of each national banking association" and the *minimum* activities that are necessary to be considered engaged in the "business of banking" under Section 27.

3. The National Bank Act's Chartering Provisions Need Not Be Construed In Pari Materia *with Other Federal Banking Statutes*

CSBS contends that the OCC's interpretation of its chartering authority under Section 27(a) fails because it cannot be read *in pari materia* with federal banking statutes other than the National Bank Act. Applying this canon of construction, however, "makes the most sense when the statutes were enacted by the same legislative body at the same time." *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). Similarly, courts caution against reading

statutes *in pari materia* where "the statutes, though relating to the same subject matter, have significantly different purposes." *United Shoe Workers of Am., AFL-CIO v. Bedell*, 506 F.2d 174, 188 (D.C. Cir. 1974).

Here, the National Bank Act's chartering provisions predate all other federal banking statutes by many decades, weakening any interpretive connection between them. CSBS's appeal to dissimilar, later-enacted provisions outside the National Bank Act overstates these provisions' significance to this case and "stretches the *in pari materia* canon beyond reason" by applying it to a "wide swath" of the federal banking statutory scheme. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1248 (D.C. Cir. 2008). CSBS insists that these statutes cast doubt on the OCC's authority to issue SPNB Charters, but at the same time ignores the different purposes underlying them. *Id.* (observing that "'[c]haracterization of the object or purpose [of a statute] is more important than characterization of subject matter in determining whether different statutes are closely enough related to justify interpreting one in light of the other'"). Viewed in this light, CSBS's cited authority *supports* the OCC's position by stressing the importance of "refus[ing] to . . . mechanically apply[] definitions in unintended contexts." *See Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 764 (1949).[7] Even so, nothing in these statutes makes deposit-taking a necessary activity in the national bank chartering context.

[7] To demonstrate, CSBS repeatedly cites to cases involving (1) express cross-references to identical statutory terms, *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990), (2) phrases used by the Supreme Court that Congress then adopted in statutory provisions governing the same topic, *Williams v. Taylor*, 529 U.S. 420, 434 (2000), (3) phrases used within the same statute, *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988), (4) court references to later-enacted National Bank Act provisions when interpreting the National Bank Act's bank powers provision, *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 643 (D.C. Cir. 2000), or (5) cases that did not depend on the interpretation of any National Bank Act provision, *Colo. Nat'l Bank of Denver v. Bedford*, 310 U.S. 41, 48 (1940).

a. The Bank Holding Company Act Does Not Conflict with the OCC's Interpretation of the "Business of Banking"

CSBS argues that the "business of banking," as used in the National Bank Act's chartering provisions, must include deposit-taking because the BHCA defines a "bank" as either "[a]n insured bank" as defined in Section 3(h) of the Federal Deposit Insurance Act ("FDIA") or "[a]n institution . . . which . . . accepts demand deposits" and "is engaged in the business of making commercial loans." 12 U.S.C. § 1841(c)(1)(A)-(B). In doing so, CSBS discounts extensive caselaw establishing that the BHCA does not affect the nature or the scope of the OCC's chartering authority.

To illustrate, CSBS's insistence that the National Bank Act and the BHCA "fulfill a common purpose" ignores the D.C. Circuit's observation that these statutes "were enacted over sixty-five years apart and deal with two different types of banking institutions, each subject to a distinct set of laws and regulations administered by separate agencies." *Indep. Ins. Agents of Am., Inc. v. Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993) (quoting *Nat'l Ass'n of Life Underwriters v. Clarke*, 736 F. Supp. 1162, 1171 (D.D.C. 1990)); *see also Am. Ins. Ass'n v. Clarke*, 865 F.2d 278, 287 (D.C. Cir. 1989) (acknowledging differences between the National Bank Act and the BHCA). Similarly, the Supreme Court underscored the differences between these statutes by analyzing the OCC's ability to issue a certificate of authority for a new national bank separately from the Federal Reserve Board's ability to approve a related holding company arrangement. *See Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 417 (1965).

CSBS argues that the *Ludwig* and *Clarke* decisions hold no weight because they discussed the BHCA's relationship to national bank activities rather than national bank charters. Opp. 34. But nothing in these decisions—and nothing in the statutory text—suggests that

Congress intended the BHCA to govern anything besides affiliations between BHCA-defined "banks" and other companies. Nor does the BHCA speak to the OCC's chartering authority under the National Bank Act: it simply provides that if an entity qualifies as a "bank" under 12 U.S.C. § 1841(c)(1), then the BHCA's restrictions apply to any company that owns it.[8] *See* 12 U.S.C. § 1841 *et seq.* Recognizing this, both *Ludwig* and *Clarke* stressed how the OCC's chartering authority "derive[s] . . . solely under" the National Bank Act. *Ludwig*, 997 F.2d at 962 (citing *Clarke*, 865 F.2d at 278).

CSBS mistakenly presumes that all national banks operate under a bank holding company structure, but many national banks operate under other structures; for example, those owned by individual shareholders. In these situations, the BHCA bears no applicability to the shareholder-owned national bank, undermining any connection between the BHCA's "bank" definition and the National Bank Act's chartering provisions. *See Whitney*, 379 U.S. at 423 (noting that "it is the ownership of [the new bank] by the holding company that is at the heart of the project, not the permission to open for business"). Mirroring this, the BHCA also contains several express exceptions to its general "bank" definition. 12 U.S.C. § 1841(c)(2). By including these exceptions, Congress acknowledged how the BHCA serves no purpose for certain categories of banks. And by recognizing that banks can exist and operate outside the BHCA, Congress further underscored the lack of any connection between the OCC's chartering authority and the BHCA's narrow "bank" definition. *See Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.* 474 U.S. 361, 374 (1986) (recognizing that certain banking institutions could operate

[8] CSBS's cited academic literature bears no applicability for this reason: it discusses the BHCA's definition of a "bank," while also acknowledging that various banks, at one point in time, did not accept deposits. Opp. 34 n.13 (citing Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 718 (1983)).

outside the BHCA by interpreting Section 1841(c)(1) "as Congress had written it," *i.e.*, as not including so-called "nonbank banks" that performed the "functional equivalent of banking services" but did not fall under the provision's narrow terms).[9]

Despite the fundamental disconnect between the BHCA and the OCC's chartering authority, CSBS suggests that "[a]s long as a substantial BHCA issue is present"—such as whether these recipients can access the payments system and discount window—an applicant cannot "commence the business of banking" until the Federal Reserve Board resolves them. Opp. 35. But these matters are *not* BHCA issues, as banks not owned by bank holding companies remain eligible to receive these services. CSBS similarly argues that another "substantial question" arises regarding whether the BHCA's anti-tying restrictions would apply to SPNB charter recipients. *Id.* But again, the BHCA's potential effect on a national bank's future operations says nothing about the OCC's authority to issue a charter under the National Bank Act in the first instance. *See Whitney*, 379 U.S. at 423.

b. CSBS Misconstrues the Federal Reserve Act's "Insured Bank" Reference and the Federal Deposit Insurance Act's "Insured Depository Institution" Definition

CSBS further maintains that the Federal Reserve Act ("FRA") and the FDIA require all nationally chartered banks to have federal deposit insurance and, by extension, to accept deposits. *See* OCC Mem. 40-44. But as the OCC discussed in its opening brief, neither the FRA nor the FDIA impose any deposit-insurance or deposit-taking requirement on institutions unless the institution at issue accepts deposits other than trust funds. OCC Mem. 40-44. Similarly,

[9] CSBS again invokes the vacated *Conover* decision for its view that Section 1841(c)(1) establishes so-called "inner limits" for the "business of banking." Opp. 34. For the reasons stated, *supra* pp. 13-14, this view expressed in *Conover* is without merit. And as discussed earlier, *supra* p. 15, *Conover*'s reasoning is rejected by later Supreme Court and D.C. Circuit decisions.

nothing in either the FRA or the FDIA states that a national bank must accept deposits to engage in the "business of banking" under the National Bank Act.

In its opposition brief, CSBS advances that 12 U.S.C. § 222 requires *every* national bank to become a Federal Reserve System member and an "insured bank" under the FDIA. Opp. 31-32. This reading, however, conflicts with the statute's text and historical context. OCC Mem. 42-44. Section 222 states:

> Every national bank in any State *shall*, upon commencing business or within ninety days after admission into the Union of the State in which it is located, become a member bank of the Federal Reserve System by subscribing and paying for stock in the Federal Reserve bank of its district in accordance with the provisions of this Act and *shall thereupon* be an insured bank under the Federal Deposit Insurance Act and failure to do so shall subject such bank to the penalty provided by the sixth paragraph of this section [12 U.S.C. § 501a].

12 U.S.C. § 222 (emphasis added). To be sure, Section 222's first clause requires all national banks "upon commencing business," to become "member bank[s] of the Federal Reserve System" by subscribing and paying for Federal Reserve stock. *Id.* But CSBS's insistence that Section 222's second clause also obliges a national bank to become an "insured bank" under the FDIA reads the word "thereupon" out of the statute. Under the last antecedent rule of statutory construction, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *see also Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330 (1993) (noting that the last antecedent rule is "quite sensible as a matter of grammar"). Correctly read, Section 222's use of "thereupon" modifies the immediately preceding word—"shall"—indicating that the second clause should be read as conveying insured status automatically after becoming a member bank. But this reading does not turn Section 222 into a "passive" statute: it still requires national banks to become

member banks by subscribing for Federal Reserve stock, and states that failure to do so subjects these national banks to penalties under 12 U.S.C. § 501a.

Reading Section 222 in this way aligns with Congressional intent and accords with historical practice. *See* OCC Mem. 43-44. As CSBS acknowledges, Congress amended Section 222 at a time when all newly chartered national member banks located in a state and engaged in the business of receiving deposits other than trust funds had to be insured and obtained deposit insurance through OCC action during the chartering process. *See* 12 U.S.C. § 1814(b) (prior to amendments by Pub. L. No. 101-73, § 205, 103 Stat. 183, 195 (1989) and Pub. L. No. 102-42, § 115(b), 105 Stat. 2236, 2249 (1991)); *see also* Opp. 32. Consistent with this preexisting system, Congress adopted Section 222 to facilitate these same ends for national non-member banks located in the Alaska and Hawaii territories when those territories became states. *See* OCC Mem. 43. Several decades later, Congress replaced Section 1814(b)'s process with Section 1815(a)(1)'s deposit insurance application system. *See id.* Thus, Section 222's allusion to a process originally intended to *assign* insured status to national non-member banks in the Alaska and Hawaii territories should not be read as imposing any deposit insurance—and, hence, deposit-taking—*requirement* on national banks.

Nor does this correct reading render Section 1815(a)(1) "irrelevant surplusage." *See* Opp. 32. As the OCC has explained, Section 1815(a)(1) does not, on its own, impose a deposit-taking requirement on national banks. OCC Mem. 41-42. The provision simply provides that qualifying "depository institutions . . . engaged in the business of receiving deposits other than trust funds . . . may become . . . insured depository institution[s]." *Id.* CSBS would have the Court ignore Section 1815(a)(1)'s qualifying language, suggesting it references select categories of state institutions that, as defined under the FDIA, need not necessarily take deposits. *See*

Opp. 33 (misciting 12 U.S.C. § 1813(b)(3); 1828(c)(1)). But again, CSBS ignores the clear implications of Section 1815(a)(1)'s text: that the statute contemplates the existence of "depository institutions"—defined to include "any bank or savings association," 12 U.S.C. § 1813(c)(1)—that do not "engage[] in the business of receiving deposits other than trust funds." Similarly, CSBS ignores many other FDIA provisions that also expressly envision the existence, operation, and supervision of uninsured banks. *See* OCC Mem. 42.

At most, Section 1815(a) denotes that all qualifying entities "engaged in the business of receiving deposits other than trust funds" must apply to the FDIC for deposit insurance. Thus, CSBS's contention that the OCC seeks "to wield the FDIC's authority" falls flat. Opp. 32-33. The OCC's authority extends to determining whether an institution engages in the "business of banking" under the National Bank Act's chartering provisions, while the FDIC's authority extends to determining whether an institution "engage[s] in the business of receiving deposits other than trust funds" under the FDIA's deposit insurance provisions.

IV. CSBS Can Identify No Constitutional Infirmity Under the Tenth Amendment Connected to the OCC's Reasonable Interpretation and Exercise of Its Chartering Authority

CSBS's Tenth Amendment claim presents nothing more than a last-ditch effort to muddy the issue of the scope of OCC interpretive authority over the National Bank Act through the haphazard invocation of cases dealing with federal preemption under disparate circumstances. Opp. 50-53. Ultimately, CSBS's arguments collapse because it cannot refute the fundamental point that the Tenth Amendment is not implicated when the OCC acts pursuant to federal law and charters and regulates a national bank. *See Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 553–54 (2009) ("OCC's reasonable conclusion . . . does not alter the federal-state balance; it simply preserves for OCC the oversight responsibilities assigned to it by Congress."); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 22 (2007) ("Regulation of national bank operations

is a prerogative of Congress under the Commerce and Necessary and Proper Clauses . . . . The Tenth Amendment, therefore, is not implicated here.") (citation omitted). Cases cited by CSBS recognize the distinction between questions of valid federal preemption of state law and questions of valid exercise of federal statutory authority. *See New York v. F.E.R.C.*, 535 U.S. 1, 18 (2002) (distinguishing cases raising the validity of a state law that conflicts with a federal law from cases putting at issue the scope of authority conferred by Congress). For these reasons, Count V fails to state a claim and is properly dismissed.

V. The OCC Has Not Made any Preemption Determination in Connection with Its SPNB Chartering Authority and CSBS Has Suffered No Procedural Injury

CSBS wrongly contends that the OCC's decision to accept applications for SPNB Charters constitutes a preemption determination pursuant to 12 U.S.C. § 25b that would require notice and comment pursuant to 12 U.S.C. § 43. Opp. 53-55. As the OCC previously explained, "a fintech chartered as a national bank under Section 5.20(e)(1) would be entitled to the protections of the National Bank Act against state interference." OCC Mem. 44. CSBS reasons that, because the holder of an SPNB Charter would enjoy the protection of federal preemption "to the same extent" as any other nationally chartered bank, this constitutes a new preemption determination triggering certain statutory obligations. Opp. 54. CSBS's incorrect conclusions are drawn from a fundamentally flawed premise.

First, the OCC's announcement that it will accept applications for SPNB Charters is not a decision by the OCC that any state law is preempted. Moreover, whether a state consumer financial law prevents or significantly interferes with the exercise by an SPNB of its powers is not at issue in this case and would not be part of a decision to grant a particular charter application. While an SPNB "engages in a limited range of banking or fiduciary activities, targets a limited customer base, incorporates nontraditional elements, or has a narrowly targeted

business plan," *Comptroller's Licensing Manual Supplement, Considering Charter Applications from Financial Technology Companies*, p. 2, attached to OCC Mem. as Ex. D, the fact that a national bank may be entitled to seek a ruling on the preemption of state laws that conflict with the National Bank Act is not the result of any action by the OCC, but rather, through the operation of the Supremacy Clause of the Constitution.

Second, a newly chartered SPNB will enjoy the same protection of federal preemption as any national bank in existence today. Moreover, the current boundaries of National Bank Act preemption after the enactment of the Dodd-Frank Act have already been marked out. In 2011, after notice and comment, the OCC promulgated regulations that set forth the scope of federal preemption protections applicable to national banks. *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43549-01 (July 21, 2011).[10]

CSBS's attempt to link the grant of an SPNB Charter with Section 25b preemption determinations does not advance its cause. Apart from the fact that, as previously noted, the decision to accept applications and a decision to grant a charter do not implicate preemption analysis, a Section 25b preemption determination (to be made by the OCC or by a court) could only theoretically emerge if a state law, not already preempted by the National Bank Act as a matter of settled law or regulation, were to be found to "prevent[] or significantly interfere[] with the exercise by [an SPNB] of its powers." 12 U.S.C. § 25b(b)(1)(B).[11] Such a theoretical

[10] These final rules include, *inter alia*: 12 C.F.R. § 7.4000 (visitorial powers), 12 C.F.R. § 7.4007 (deposit-taking), 12 C.F.R. § 7.4008 (lending), 12 C.F.R. § 7.4010 (applicability of state law and visitorial powers to Federal savings associations and subsidiaries), 12 C.F.R. § 34.4 (real estate lending and appraisals, applicability of state law). CSBS submitted comments to the OCC on the proposed rulemaking, which belies any claim that CSBS has suffered a procedural injury.

[11] CSBS wrongly contends that the OCC is entitled only to *Skidmore* deference in its interpretation of 12 U.S.C. § 25b. Section 25b is part of the National Bank Act, therefore the OCC's interpretation is entitled to *Chevron* deference. A court's *review* of a preemption

preemption determination issue is just that—theoretical. And, more to the point, an assessment of whether approving a charter application will result in the preemption of state laws—either theoretically or in practice—has no bearing upon the disposition of that application. Accordingly, Count III fails to state a claim and is properly dismissed.

CONCLUSION

For the reasons stated above, the Complaint should be dismissed on all counts for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted.

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Respectfully submitted,

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determination pursuant to Section 25b, however, would entail deference as described at Section 25b(b)(5).